Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-747

WANDA JOYCE LEE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NO. ———

WANDA JOYCE LEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your Petitioner, Wanda Joyce Lee, respectfully petitions this Honorable Court for a Writ of Certiorari to review a Judgment and Opinion in the United States Court of Appeals for the Sixth Circuit rendered in this cause.

OPINIONS BELOW

An Order and Memorandum (Appendix 10a) was entered by the District Court on February 24, 1977 and is reported at *427 F. Supp. 318*. The Opinion of the Sixth

Circuit Court of Appeals (Appendix 23a) was filed on August 21, 1978 and is not yet reported.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals sought to be reviewed and the date of its entry is August 21, 1978. (App. 1a) An Order of the Court of Appeals denying a timely Petition for Rehearing was entered October 20, 1978 (App. 40a). This Court's jurisdiction is envoked under *28 USC 1254 (1)*.

QUESTIONS PRESENTED FOR REVIEW

Where a search warrant is sought exclusively on the information provided by the informant and that information is entirely a conclusionary statement the test of *Aguilar-Spinelli* is not satisfied by merely showing that the informant was in a position to obtain information as the Court below held but the affidavit must set forth some of the facts observed by or told to the informant that were used by him to form his conclusions as the Second Circuit has required in *United States* v. *Karathanos*, 531 F. 2d 26 (2nd Cir., 1976) Cert. den. 428 U.S. 910.

CONSTITUTIONAL PROVISIONS, JUDICATORY PROVISIONS AND THE FEDERAL RULES OF CRIMINAL PROCEDURE

1. Fourth Amendment to the United States Constitution:

AMENDMENT IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On November 15, 1976 Federal Agent Gerald C. Gantenbein, Bureau of Alcohol, Tobacco and Firearms, appeared before the United States Magistrate, J. Gregory Wehrman, and subscribed to Affidavit in support of his requested Search Warrant for the premises of the Petitioner, Wanda Lee, located at 270 Webster Lane, Independence, Kentucky (Appendix 2a). The Affidavit provided in pertinent part that Gantenbein had, on November 15, received information from a reliable confidential informant to the effect that in the past five (5) days the informant observed a subject named Wanda Lee in possession at her residence of a large quantity of stolen property that was taken in residential burglaries in the State of Ohio. The informant further told Agent Gantenbein that in addition to the stolen property there were several stolen firearms which were described as a miscellaneous lot of long guns and hand guns totaling approximately 15 in number. The Affidavit further related that the informant had stated that

several of the firearms were shot guns and rifles of varying descriptions and calibers. In an effort to investigate the informant's information Agent Gantenbein stated that he observed two vehicles parked in front of the property at 270 Webster Lane, Independence, Kentucky and he caused a license check to be made on those two vehicles. The results of that check disclosed that both vehicles were registered to the Petitioner herein, Wanda Lee.

As a result of the Affidavit of Agent Gantenbein, U.S. Magistrate Wehrman issued a Search Warrant for the residence of the Petitioner at 270 Webster Lane, Independence, Kentucky (Appendix 5a). The search of the Petitioner's residence was commenced at approximately 3:00 P.M. and continued until approximately 12:00 P.M. that same day. Prior to commencing the search Agent Gantenbein requested that an officer of the Kentucky State Police accompany him on the search.

After Agent Gantenbein, the other agents and the State Police Officer were on the premises approximately five minutes a large quantity of sterling silver was discovered throughout the residence. After the discovery of this silverware the Kentucky State Police Officer took over the investigation of this aspect of the case. Numerous phone calls were made to determine whether or not the silver had been stolen, after determining that it had been stolen in the State of West Virginia the State Officer seized the silver. It was removed to the State Police Headquarters where it was inventoried and stored until some time in January of 1977. Thereafter, it was turned over to the Federal Bureau of Investigation for use in connection with the Indictment that was returned in this case. It should also be noted that the inventory that was prepared of the silver seized from the Petitioner's residence was prepared on forms used by the Kentucky State Police and it was

that subsequent inventory that was eventually filed with the United States Magistrate ostensibly pursuant to the terms of the Search Warrant issued by him several months prior. Agent Gantenbein further testified that while he did not find the silverware personally he is unclear as to which particular person discovered the silverware first. However, it appears uncontroverted that the silverware was scattered throughout the residence, but principally concentrated in the laundry room. Likewise, it is uncontroverted that after discovering the silverware neither Agent Gantenbein, the officer from the Kentucky State Police, or any other law enforcement officer sought to obtain any other type of warrant to authorize the seizure of the silverware; this despite the fact that the search was commenced at approximately 3:00 P.M. and despite the fact that the residence of the Petitioner is located in a relatively urban area with easy access to either the United States Magistrate or one of almost countless state judicial officers who would, under state law, be authorized to issue an additional warrant.

REASON FOR ALLOWANCE OF THE WRIT

Where a search warrant is sought exclusively on the information provided by the informant and that information is entirely a conclusionary statement the test of Aguilar-Spinelli is not satisfied by merely showing that the informant was in a position to obtain information as the Court below held but the affidavit must set forth some of the facts observed by or told to the informant that were used by him to form his conclusions as the Second Circuit has required in United States v. Karathanos, 531 F. 2d 26 (2nd Cir., 1976) Cert. den. 428 U.S. 910.

It is essential to the consideration of this matter that it is understood that the Petitioner was, at the time this search warrant was executed, not convicted of any type of felony whatsoever and consequently, her possession of a firearm or 15 firearms would not be an illegal act per se, but would only be illegal in the event that those firearms were stolen and had been transported from one State to another. Likewise, it is not alleged in the Affidavit that the Petitioner was ever in the possession of any type of contraband whose possession would be illegal per se, such as narcotics, certain types of explosive devices and/or automatic weapons.

In the Opinion filed by the District Court Judge, the Honorable Eugene E. Siler, Jr., it is reasoned that the Affidavit to support the Search Warrant must set forth some of the underlying circumstances forming the basis for the informant's conclusion that there is illegal activity or evidence thereof on the premises. The District Court found that when the Affidavit was held to that standard it did

not sufficiently set forth any underlying circumstances that formed the basis of the informant's conclusion. Judge Cecil of the Sixth Circuit Court of Appeals, in his Opinion reversing the decision of the District Court, found that "We conclude that the personal observance of the informant of a large quantity of stolen property taken in residential burglaries in Ohio, and having seen the firearms in question, satisfy the requirement of *Aguilar* v. *Texas,* 378 U.S. 108 (1964), that some "underlying circumstances" must be shown by the informer."

Succinctly stated, the Court of Appeals felt that since the Affidavit established that the informant had been on the property in the last five days, it was sufficient underlying circumstances to support the conclusion that the property, including the firearms, were stolen in residential burglaries in the State of Ohio. The District Court, in its Opinion, felt that while mere presence might be sufficient for the underlying circumstances in situations involving the possession of an item that is illegal to possess per se, it was lacking in providing underlying circumstances to support the conclusion that the items in question were stolen in the State of Ohio or for that matter, any other state other than the Commonwealth of Kentucky for as the District Court aptly pointed out, had all of the property, including the firearms, been stolen in the Commonwealth of Kentucky, there would have been no jurisdiction in the Federal Courts and no probable cause to believe that a federal crime was or had been committed.

This Court stated in *Aguilar, supra,* and *Spinelli* v. *U.S.,* 393 U.S. 410 (1969), that the Affidavit must set forth sufficient facts to establish how the informant arrived at his conclusionary statements and whether the information supporting those conclusionary statements was obtained in a reliable manner.

It would appear that in order for the affidavit to establish probable cause of the issuance of the warrant, three factors would have to be established.

(1) That the Petitioner was in possession of firearms at 270 Webster Lane;

(2) That the firearms she was possessing were stolen and

(3) That the firearms had moved in Interstate commerce after they had been stolen.

What underlying circumstances are set forth in the Affidavit to support these three elements?

The Petitioner would concede that the fact that the informant was in the residence within the past five days and observed the firearms would be sufficient to support the first requirement, that is, that the Petitioner was in the possession of firearms at 270 Webster Lane. But as was pointed out above, since the Petitioner was not a convicted felon this sole fact would not be sufficient to establish the violation of federal law.

The next element necessary to be established by the Affidavit would be to establish that the firearms observed by the informant in the Petitioner's home were, in fact, stolen. What underlying circumstances are set forth that in any way lends any support to the proposition that the firearms possessed by the Petitioner were stolen? It is submitted that there are none. It has not been suggested by the Respondent or by the Opinion of the Court of Appeals that there was something unique about these firearms that would give them away as having been stolen. It has further not been suggested that the possession of 15 firearms in a residence is such a peculiar circumstance that it is only consistent with the possession of stolen property.

The third requirement that the firearms had moved in Interstate commerce after they had been stolen, is perhaps the most difficult of all to support. Even if an informant could have concluded that the number of firearms would indicate that they were stolen, certainly, the number would not have indicated that they were stolen in a state other than the Commonwealth of Kentucky. Nevertheless, the informant made the statement that they were stolen in residential burglaries in the State of Ohio.

Understandably, a search cannot be justified or held invalid because of the results obtained in the search. However, it should be noted that in the instant case no property, "stolen in residential burglaries in the State of Ohio" was recovered. Moreover, as can be inferred from the partial return on the search warrant filed by Agent Gantenbein and his apparent notes in the margin thereof, of the eight firearms recovered from the Petitioner's home only two appear to have been stolen and none appear to have been stolen in the State of Ohio.

If the holding in the instant case is allowed to stand, virtually any search warrant, issued on the basis of an informant's Affidavit, would be sufficient if the informant states that he was personally present on the premises to be searched within a reasonable period of time before execution of the warrant. For, as can be seen from the Opinion of the Circuit Court, this is the only underlying circumstance which the Court had to support the conclusions of the informant.

A similar factual situation was presented to the Second Circuit in *United States* v. *Karathanos*, 531 F. 2d 26 (2nd Cir., 1976), wherein a search warrant was issued after an informant provided information to an Immigration and Naturalization Service Agent that illegal aliens were employed at the premises to be searched. The only under-

lying circumstance provided by the informant was the same as in the present case, namely, that within the recent past the informant had been on the premises. *Karathanos, supra* at page 29. The problem confronting the Second Circuit was the same problem that confronted the District Judge in the instant case but was ignored by the Circuit Court below, namely, how does an informant look at someone or something, which is not in itself illegal and conclude that a violation of federal law is occurring? Moreover, how does an issuing Magistrate determine probable cause in line with the *Aguilar, supra,* and *Spinelli, supra,* decisions if the only underlying circumstance provided in the Affidavit is the personal observance of a person or item that is not illegal per se?

The Second Circuit stated:

> "With this basic framework in mind, we turn our attention to whether the requirements of the first phase of the *Aguilar-Spinelli* test have been met. The only information presented in the Jacobs Affidavit to indicate how the informant Athanasiou reached his conclusion that there were illegal aliens at the restaurant is the statement that he had lived on the premises with these aliens. The government, recognizing that the mere presence of aliens (assuming that Athanasiou had a basis for concluding they were aliens) would not provide a basis for concluding that they had entered the United States illegally or otherwise violated immigration laws, strenuously argues that his statement gives rise to a reasonable inference that the other aliens must have admitted to him their illegal status, and thus provides sufficient assurance that he reached his conclusion in a reliable way.
>
> Unquestionably statements to the informant by the other aliens that they were illegally in the United States would have been sufficient to support a holding that the information was reliably obtained by the informant. See, e.g., *United States* v. *Sultan,* 463 F. 2d 1066, 1968 (2d Cir., 1972). But the affidavit's bald statement that Athanasiou had lived with the other aliens is an insufficient basis for inferring that they made such incriminating admissions. While coworkers and bunkmates may exchange considerable amounts of information, it can hardly be assumed that, living in fear of arrest and deportation, illegal aliens would have revealed their illegal status to a stranger such as Athanasiou. On the contrary, one would expect this subject to rank high on the list of topics too sensitive to be casually revealed. The unlikelihood that the information was directly revealed by any of the aliens to Athanasiou is heightened by the fact that in depositions taken later in the present proceeding the deposition of Athanasiou was taken in the Greek language whereas the depositions of six out of seven of the seized aliens were taken in the Spanish language, indicating that any communication between him and them would have been handicapped by a language barrier." *Karathanos, supra* at page 30.

Compare this to the language of the Sixth Circuit in the instant case:

> "Coming now to the Affidavit before us, and interpreting it in the commonsense and realistic fashion provided in Vantresca, we conclude that the personal observance of the informant of a large quantity of stolen property taken in residential burglaries in Ohio, and having personally seen the firearms in question, satisfy the requirement of *Aguilar* that some 'underlying circumstances' must be shown by the informer.
>
> "We said in *United States* v. *Sevier,* 539 F. 2d 599, 603,
>
> > 'Great deference, even in a doubtful case, must be given by courts to the determination of magistrates.'

"In *United States* v. *Swihart, supra*, we said,

> 'That determination should not be set aside unless arbitrarily exercised.'

"The statement of our court in *Jenkins, supra*, at 823 is applicable here.

> 'In the light of this discussion, we do not hesitate to say that the affidavit here at issue is considerably less than ideal. However, in determining whether a search warrant should issue, the magistrate deals only with probabilities rather than certainties.'

"We hold that the affidavit was sufficient to give the magistrate probable cause for issuing the search warrant." (Appendix Page 31a).

Petitioner suggests that in order to issue the warrant in the instant case the magistrate, and in approving it, the Court of Appeals had to make critical assumptions, assumptions not permitted by *Aguilar-Spinelli* at least not as interpreted by the Second Circuit in *Karathanos, supra*, and subsequent cases decided in that Circuit. Those assumptions are, of course, that the informant knew the property to be stolen in another state either because: (1) the petitioner told the informant so or (2) the informant had in some way participated in the theft or transportation of the property.

Judge Meshill of the Second Circuit, writing the Opinion of the Court in *United States* v. *Galante*, 547 F. 2d 733 (2nd Cir., 1976), explained the *Karathanos* decision as follows:[1]

[1] The search in *Galanto* was not set aside because the Court found the defendants did not have standing to object to the search. Consequently, the *Karathanos* issue was not reached.

> In *Karathanos*, we held that *Aguilar* and *Spinelli* require that an affidavit based upon an informant's tip must set forth the basis upon which the informant believes the activity to be criminal. *Galante, supra* at 736 note 1

As recently as 1978 the Second Circuit was again presented the issue raised in *Karathanos, supra*, and again followed its dictates although it refused to set aside the search. In *United States* v. *Kahan*, 572 F. 2d 923 (2nd Cir., 1978), an informant stated that he had observed stolen razors and blades in a certain warehouse because he had transported them there. The informant also provided certain identifying numbers contained on the cartons which when checked by the agents, corresponded to the numbers on cartons recently highjacked from an interstate shipment. (It should be noted that these were model numbers rather than serial numbers. Consequently, while it could not be positively stated that these cartons were the same ones stolen from the interstate shipment, the probability increased). Additionally, the federal agents, after a surveillance observed the cartons personally. In *Kahan, supra*, the Court refused to set aside the search on the basis of *Karathanos, supra*, as urged by the Appellants:

> "The seemingly small but, as the majority found, critically important defect in the affidavit was that the informer's statement to the affiant omitted to say how the informer learned (rather than surmised) that the aliens with whom he had been living and working had entered the country illegally: that is, the affidavit would have been sufficient if the affiant had said that the informer said at least eight other persons working at the restaurant told him that they were illegal aliens rather than saying that the informer had said that 'eight other persons known to him to be illegal aliens were employed at the restaurant.' (531 F. 2d at 29).

> The difference was precisely that between empty opinion and competent evidence." *Kahan, supra* at 926.

The issue is thus joined; is the requirement of *Aguilar-Spinelli* that "some underlying circumstances" be shown in the Affidavit satisfied by the showing of mere presence of the informant as the Sixth Circuit determined in the instant case or is the more stringent requirement of the Second Circuit as set forth in *Karathanos, supra,* and the cases that followed that the circumstances supporting the conclusion of illegal activity be shown, to be the rule regarding the use of information provided by informants? The Petitioner submits that the rule announced by the Second Circuit rather than the rule of the Sixth Circuit in the instant case must be followed. To do otherwise would open a Pandora's box of possible abuse, for once the informant states that he was on the premises to be searched it matters not how he obtained his information that illegal activity was occurring, and for all the Magistrate may know the informant is basing his conclusion on nothing ". . . more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli, supra* at 393 U.S. 416.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

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Covington, Kentucky 41012

ATTORNEY FOR
PETITIONER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5229

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WANDA JOYCE LEE,
Defendant-Appellee.

Before: WEICK and KEITH, Circuit Judges, and CECIL, Senior Circuit Judge.

JUDGMENT

(Filed August 21, 1978)

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to try the Defendant on the indictment.

No costs taxed.

ENTERED BY ORDER OF THE COURT.
John P. Hehman, Clerk

By /s/ GRACE KELLER
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
EASTERN JUDICIAL DISTRICT OF KENTUCKY

Docket No. 76-80M

Case No. -------

UNITED STATES OF AMERICA
vs.

Premises of 270 Webster Lane
Independence, Kentucky 41051
Kenton County

AFFIDAVIT FOR SEARCH WARRANT

BEFORE J. Gregory Wehrman, Covington, Kentucky

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the premises known as) the Wanda Lee residence, consisting of a one story, red brick dwelling house, white shingle roof and white trim, and all outbuildings, appurtenances and motor vehicles thereon, located starting at the intersection of Kentucky Highway 17 and Independence Station Road travel northwest on Independence Station Road for one mile to the intersection of Independence Station Road and Cody Road, turn left or west onto Cody Road, go .2 mile to the intersection of Cody Road and Webster Lane, turn right or north onto Webster Lane, go approximately 250 yards to 270 Webster Lane, this being the only dwelling house on the right or east side of Webster Lane from Cody

Road to the railroad tracks crossing Webster Lane in Independence, Kenton County, in the Eastern District of Kentucky, there is now being concealed certain property, namely firearms; to wit, miscellaneous rifles, shotguns and handguns, papers or records pertaining to the acquisition and disposition of firearms which are being possessed in violation of Title 18, Section 922 (j), U.S.C. and subject to seizure under Title 18, Section 924 (d) of the 1968 Gun Control Act.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On November 15, 1976, I received the following information from a reliable confidential informant who has demonstrated his reliability in the past by providing information which has resulted in several arrests, the seizure of illegal firearms, narcotics and stolen property. The informant stated that within the past five days, the informant observed a subject named Wanda Lee, who resides at 270 Webster Lane, Independence, Kentucky, in possession at her residence of a large quantity of stolen property that was taken in residential burglaries in the State of Ohio. The informant further related that amongst this property there were several stolen firearms which had been transported from the State of Ohio to the State of Kentucky.

The firearms were described as a miscellaneous lot of long guns and handguns totaling approximately fifteen in number. Several of these firearms are shotguns of varying descriptions and calibers. The informant also related that it is common practice for Wanda Lee to transport stolen firearms in the trunk of various automobiles available to her and that she sells or disposes of them from the trunk of the car.

These firearms were personally seen by the informant at the residence of Wanda Lee, 270 Webster Lane, Independence, Kentucky.

On November 15, 1976 a surveylance of the premises showed two vehicles parked on the premises. Vehicle #1 is described as a 1974 Oldsmobile bearing Kentucky License #FJD 861, and Vehicle #2 a 1971 Chevrolet bearing Kentucky License #FJD 862. A check of the Kenton County Registrar shows that both of the vehicles are registered to Wanda Lee, Box 270 Webster Road, Independence, Kentucky.

/s/ GERAND C. GANTENBEIN
Special Agent, ATF

Sworn to before me, and subscribed in my presence, November 15th, 1976.

/s/ J. GREGORY WEHRMAN
Judge

UNITED STATES DISTRICT COURT
FOR THE
EASTERN JUDICIAL DISTRICT OF KENTUCKY

Docket No. 76-80M

Case No. ———

UNITED STATES OF AMERICA

vs.

Residence of Wanda Lee
270 Webster Lane
Independence, Kentucky 41051
Kenton County

SEARCH WARRANT

To any Special Agent of the Bureau of Alcohol, Tobacco and Firearms or any other authorized person

Affidavit (s) having been made before me by Gerald C. Gantenbein that he has reason to believe that on the premises known as the Wanda Lee residence, consisting of a one story, red brick dwelling house, white shingle roof and white trim, and all outbuildings, appurtenances and motor vehicles thereon, located starting at the intersection of Kentucky Highway 17 and Independence Station Road travel northwest on Independence Station Road for one mile to the intersection of Independence Station Road and Cody Road, turn left or west onto Cody Road, go .2 mile to the intersection of Cody Road and Webster Lane, turn right or north onto Webster Lane, go approximately 250

yards to 270 Webster Lane, this being the only dwelling house on the right or east side of Webster Lane from Cody Road to the railroad tracks crossing Webster Lane in Independence, Kenton County, specifically vehicles bearing Ky. Lic. #FJD 861 and #FJD 862, in the Eastern District of Kentucky, there is now being concealed certain property, namely firearms; to wit, miscellaneous rifles, shotguns and handguns, papers or records pertaining to the acquisition and disposition of firearms and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit (s) .

You are hereby commanded to search within a period of forty-eight hours (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before J. Gregory Wehrman as required by law.

Dated this 15th day of November, 1976.

/s/ J. GREGORY WEHRMAN
Judge

RETURN

I received the attached search warrant 11-15, 1976, and have executed it as follows:

On 11-15, 1976 at 3:00 o'clock PM, I searched the person or premises described in the warrant and I left a copy of the warrant with Wanda Lee together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Marlin, bolt action rifle, Model 25, .22 cal. S/N 70203311

La Fever, 12 ga. double shotgun S/N 163852 [can't trace]*

Gerstenberger, EMGE, 22 cal. revolver, S/N 107527 [can't trace]

Galesi-Brecia, 6.35 mm S/auto pistol, Nickle, S/N 465820 [Present]

Colt, Frontier Scout .22 cal. single action revolver S/N 425761 [stolen]

Rohm, RG10 .22 cal. revolver S/N 694196 [Bertive Dayton Ky.]

Colt Frontier Scout .22 cal. revolver, S/N 63338P [Tennessee]

S&W .38 cal squeezer nickle plated S/N 187190 [Stolen]

S&W .32 cal. Model 30-1, snub nose, S/N 70151 [Hiance car]

---

* Bracketed material appeared in left hand margin on original copy.

This inventory was made in the presence of Special Agents Miller and Sarwage.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ GERALD C. GANTENBEIN

Subscribed and sworn to and returned before me this ..... day of ....., 19..

.....

Federal Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL NO. 76-59

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

WANDA JOYCE LEE,
DEFENDANT.

ORDER

(Filed February 24, 1977)

Upon motion made by the defendant, and for the reasons as stated in the Memorandum Opinion of even date, it is hereby

ORDERED that the motion to suppress be and is sustained, and the silverware seized on November 15, 1976, at the home of the defendant, be and is suppressed.

This 23 day of .February, 1977.

/s/ EUGENE E. SILER, JR.,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL NO. 76-59

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

WANDA JOYCE LEE,
DEFENDANT.

MEMORANDUM OPINION

(Filed February 24, 1977)

Pursuant to Rule 41 (f), Federal Rules of Criminal Procedure, the defendant has filed a motion to suppress evidence, to wit, items of silverware taken from the defendant's residence in Independence, Kentucky, on November 15, 1976, in a search conducted pursuant to a federal search warrant. After a hearing, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On November 15, 1976, Special Agent Gerald Gantenbein of the Bureau of Alcohol, Tobacco & Firearms, U.S. Treasury Department, filed an affidavit for a search warrant before U.S. Magistrate J. Gregory Wehrman. In it, he alleged that at the Wanda Lee residence described, there were certain firearms, to wit, miscellaneous rifles, shotguns and hand guns, papers or records pertaining to the acquisition and disposition of firearms being possessed in violation of 18 U.S.C. § 922 (j).

The grounds alleged for the issuance of the warrant were that on November 15, 1976,

> I received the following information from a reliable confidential informant who has demonstrated his reliability in the past by providing information which has resulted in several arrests, the seizure of illegal firearms, narcotics and stolen property. The informant stated that in the past five days, the informant observed a subject named Wanda Lee who resides at 270 Webster Lane, Independence, Kentucky, in possession at her residence of a large quantity of stolen property that was taken in residential burglaries in the State of Ohio. The informant further related that amongst this property there were several stolen firearms which had been transported from the State of Ohio to the State of Kentucky. The firearms were described as a miscellaneous lot of long guns and hand guns totaling approximately fifteen in number. Several of these firearms are shotguns of varying descriptions and calibers. The informant also related that it is common practice for Wanda Lee to transport stolen firearms in the trunk of various automobiles available to her and that she sells or disposes of them from the trunk of the car. These firearms were personally seen by the informant at the residence of Wanda Lee, 270 Webster Lane, Independence, Kentucky.
>
> On November 15, 1976, a surveylance (sic) of the premises showed two vehicles parked on the premises. Vehicle No. 1 is described as a 1974 Oldsmobile bearing Kentucky license # FJD 861, and vehicle No. 2, a 1971 Chevrolet bearing Kentucky license # FJD 862. A check of the Kenton County Registrar shows that both of the vehicles are registered to Wanda Lee, Box 270 Webster Road, Independence, Kentucky.

A search warrant was issued on the same day by Magistrate Wehrman directing the execution by "any Special Agent of the Bureau of Alcohol, Tobacco & Firearms or any other authorized person." It called for the search to be conducted for the firearms, papers, or records pertaining to the acquisition and disposition of firearms, as described in the affidavit for the search warrant, but did not call for a search for any other stolen property.

The search was commenced the same day at 3:00 P.M. and lasted until almost midnight of the same evening. Involved in the execution of the search warrant were Special Agent Gantenbein and other special agents with the Bureau of Alcohol, Tobacco & Firearms and one State Police officer, Sgt. Heath. As a result of the search, a large quantity of silverware, with total value estimated at $39,145.29, and nine firearms were seized and taken from the premises. After the search was completed, Special Agent Gantenbein filed his inventory pursuant to Rule 41(d) with the United States Magistrate, but that inventory only included the firearms. Subsequently, after the defendant had moved the Court to suppress, alleging, among other things, that a complete inventory was not filed, another inventory was filed on January 12, 1977, listing the silverware taken.

Upon execution of the search warrant, almost immediately upon entering the premises, Special Agent Gantenbein saw in clear view in the laundry room the large quantity of silverware. On some of the items were found initials which did not correspond with those of Wanda Lee. Included in those initials were the following letters: "H," "LGG," "W," "WBH," "LM," "M," "MEM," "A," "ABP," "D," "E," "KW," "CSW," "DHA," "LHW," "HM," "EAA," "MAL," "LVM," "HD," "B," "SW," "HKC," "Y," "AB," and "HJ." Some of these items

were sterling silver. There were in excess of 200 separate items of silver taken, mostly flatware, but including candleholders, dishes, bowls, pitchers, large trays, a silver coffee pot, silver goblets, a silver service and several carving sets. These were all items not ordinarily seen in a person's laundry room and were found in open view there.

After the agents had seen the silver, they found in the fireplace scraps of paper indicating that the silver belonged to a lady in Virginia. While the agents were still on the premises, the Kentucky State Police made telephone calls to Waynesboro, Virginia, and found that some two days earlier, the residence of a lady had been burglarized in that area and she had lost some silver in the burglary. Thereafter, the items listed in the two inventories were taken from the premises, with the firearms being taken by the federal agents, and the silver and other items taken by the Kentucky State Police. As a result, the indictment in this case was returned, charging the defendant, Wanda Joyce Lee, with a violation of 18 U.S.C. § 2315, knowingly receiving stolen property of a value in excess of $5,000.00, which had been transported in interstate commerce from Virginia to Kentucky. As far as can be determined at this time, no indictments have been returned in this Court pertaining to the firearms, nor have any state proceedings been instituted concerning the receipt of stolen property.

CONCLUSIONS OF LAW

The defendant has raised several questions about the sufficiency of the warrant and the search. They are as follows:

1. The warrant is defective because it was not directed to a specific federal agent.

2. The inventory filed was defective.

3. The silverware discovered were beyond the scope of the search.

4. The failure of the affidavit to allege probable cause for the search warrant.

5. The state officer was not authorized to participate in the search and, therefore, any items which were seized by him must be suppressed.

Some of these issues can be disposed of easily, whereas the others give the Court a great deal of trouble. They will be discussed one at a time.

FAILURE TO NAME THE EXECUTING OFFICER

Under Rule 41 (c), FED.R.CRIM.P., a search warrant "shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States." The defendant asserts that because no person was specifically named to execute the warrant, it is void and, therefore, the items seized as a consequence must be suppressed. In support of her position, the defendant cites *United States* v. *Soriano*, 482 F.2d 469 (5th Cir. 1973). In that case, however, the search warrant failed to name any person; instead, the name of the person to execute the search warrant was left completely blank and neither name nor title appeared therein. However, the Court held that since it was executed by a Special Agent of the Bureau of Narcotics, who was ordered orally by the Magistrate to execute the warrant, and since this special agent identified himself at the premises searched, all relevant interests were protected. In the case at hand, the search warrant was directed to officers by title rather than name, and those officers are in fact civil officers of the United

States authorized to enforce law. *Cf. United States* v. *Andrews*, 347 F.2d 207 (6th Cir.), *cert. denied*, 382 U.S. 956 (1965). Additionally, Public Laws 90-618 and 351 provide for the administration and enforcement of these firearms laws to be in the Treasury Department, in which the Bureau of Alcohol, Tobacco & Firearms is included. See 18 U.S.C.A. § 921, Historical Note. Moreover, in *United States* v. *Gannon*, 201 F.Supp. 68 (D. Mass. 1961), a search warrant was directed "to any U.S. Marshal, any of his deputies, or any other authorized person," and was upheld in spite of the fact that it was executed by a special agent of the Internal Revenue Service. Judge Wyzanski held that a private person has no standing to complain of the failure of the correct officer to execute a search warrant; it is a command to an officer, who has the responsibility to see that the law is followed in the execution of a search warrant. Therefore, this Court finds that the directive on the search warrant met the requirement of Rule 41 (c).

IMPROPER RETURN ON INVENTORY

Pursuant to Rule 41 (d), the return of the search warrant "shall be made promptly and shall be accompanied by a written inventory of any property taken." The return for the silverware, as stated, was not effected until almost two months later. However, the return of a search warrant is ministerial and any failure therein does not void the warrant, unless the defendant can show any prejudice because of this. See *United States* v. *Moore*, 452 F.2d 569 (6th Cir. 1971), *cert. denied*, 407 U.S. 910 (1972). Inasmuch as no prejudice has been shown here, as, unlike *Moore*, the tardy inventory has been filed prior to trial, the motion to suppress based upon a faulty inventory will be overruled.

SEARCH BEYOND THE SCOPE OF THE WARRANT

In the case of *United States* v. *Gray*, 484 F.2d 352 (6th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974), while executing a state search warrant for intoxicating liquor, police officers came upon two rifles in a clothes closet. They were taken downstairs to the business area of the building and the serial numbers copied before the firearms were placed back in the closet. Later, the serial numbers were run through the National Crime Information Center computer and listed as identifying stolen firearms. Based upon this information, the officers procured a second warrant for the rifles and subsequently seized them. The Court held there that the removal of the rifles from the closet and the copying down of the serial numbers were an illegal seizure. That case has since been distinguished because the rifles there were not contraband and the officers had no reason to believe that they were stolen. Thus, where officers were executing search warrants for marijuana, *United States* v. *Chapman*, — F.2d — (No. 76-1744, 6th Cir., Feb. 9, 1977), or gambling records, *United States* v. *Truitt*, 521 F.2d 1174 (6th Cir. 1975), and where sawed-off shotguns were seized in plain view, the seizures were upheld because the sawed-off shotgunds were contraband. Actually, a sawed-off shotgun may not be contraband, unless it is in violation of 26 U.S.C. § 5861, such as not having been registered in the National Firearms Registration and Transfer Record or having its serial number removed. Admittedly, a sawed-off shotgun is more likely to be contraband than a rifle, but such weapon may be properly registered and possessed under Chapter 53, Title 26, United States Code.

Thus, one must look at the totality of the circumstances surrounding the seizure of an item not named in the search warrant. For instance, an officer may seize that which is

in plain view when he inadvertently comes across such an item incriminating the accused, but it must be "immediately apparent to the police that they have evidence before them." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 446 (1971), cited in *United States* v. *Gray*, *supra* at 355. Although the silverware here cannot be classified as contraband per se, nevertheless, its presence in the laundry room, the large quantity of it, and the unusual grouping of patterns and initials would lead an officer to look closely at them when they are in open view. Furthermore, as the officers were authorized under the search warrant to look for papers or records, they had an obvious right to look in the fireplace when they found the other papers pertaining to the silverware. Then, based upon this information, and before moving the silver, they made a telephone investigation to determine if the silver was stolen. At that point, they had probable cause to seize the silver and take it from the premises. Had it been a few pieces of silver in the kitchen, dining room or some other appropriate location, with no initials engraved thereon, or if the initials had been the defendant's, circumstances would have been quite different. For the reasons as stated herein, the seizure of the silverware under this warrant was not unreasonable under the language in *Gray*. See also *United States* v. *Alloway*, 397 F.2d 105 (6th Cir. 1968).

PROBABLE CAUSE TO ISSUE WARRANT

This question gives the Court a great deal of trouble. To be certain, it was said in *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965):

> [A]ffidavits for search warrant, such as the one involved here, must be tested and interpreted by magistrates in courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers

> in the midst and haste of a cirminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Moreover, if a magistrate is provided with sufficient information to enable him to make a considered judicial determination of probable cause, a reviewing court will pay substantial difference to that determination. See *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964). But *Aguilar* and its successor, *Spinelli* v. *United States*, 393 U.S. 410 (1969), require a "two-pronged" test. First, the affidavit must set forth some of the underlying circumstances forming the basis for the informant's conclusion that there is illegal activity or evidence thereof on the premises, and, second, it must state facts which give some assurance that the informant is a credible person.

Although the defendant argues that the second prong has not been met here, the Court is of the opinion that the reliability and credibility of this informant is shown by the fact that he has provided information in the past which has resulted in arrests. See *Draper* v. *United States*, 358 U.S. 307 (1959). In addition, the informant had seen the firearms and described them to some degree. Thus, this detail lends credence to the credibility of the informant. See *Jones* v. *United States*, 362 U.S. 257 (1960).

However, the underlying circumstances forming the basis for the informant's conclusion that there was stolen property on the premises of Wanda Lee is suspect. This is a different situation from those in which the informant makes a conclusion that the subject of the search was in possession of narcotics, *Jones* v. *United States*, *supra*; non-

taxpaid distilled spirits, *United States* v. *Harris*, *supra*; or the possession of firearms by a person known to be a convicted felon, *United States* v. *Combs*, 468 F.2d 1390 (6th Cir. 1972), *cert. denied*, 411 U.S. 948 (1973). In each of those instances, the possession alone of the items involved is sufficient to form a basis for probable cause to believe the crime is being committed. Of course, there is always the possibility that the narcotics were legally purchased, or the whiskey had the tax paid thereon, or the convicted felon had authority to possess the weapons, but one must deal with probabilities.

On the other hand, it is another matter when one alleges that on certain premises are located *stolen* property. Moreover, the affidavit here alleges that the property was taken from "residential burglaries in Ohio" and it further alleges that there were several stolen firearms which had been transported from Ohio to Kentucky. There is nothing here to indicate that the possession of the firearms by Wanda Lee was illegal, inasmuch as there was no allegation that she had ever been convicted of a felony. Moreover, the possession of stolen guns or stolen property would only be a state offense, not a federal one, unless the property had been transported in interstate commerce after the theft.

In the hearing held in this case, the Court stated that it found probable cause for the issuance of the warrant. However, on further consideration of the language in the affidavit, the Court finds that the language was too conclusory and does not provide the circumstances underlying the information from the informant to believe it was credible. To be sure, as the United States has alleged, the information is based upon personal observation of the informant. See, *e.g.*, *United States* v. *Viggiano*, 433 F.2d 716 (2d Cir. 1970). However, the informant could not tell

by personal observation alone whether the firearms in question were stolen or had been transported from Ohio to Kentucky.

A case in point is *United States* v. *Karathanos*, 531 F.2d 26 (2d Cir.), *cert. denied*, 96 S.Ct. 3321 (1976). There, in an affidavit for a search warrant, the informant alleged that there were illegal aliens in a particular restaurant in New York. The Court held that this language precluded the Court from determining whether the informant reached his conclusion in a reliable manner. Thus, the Court reasoned, to infer the informant reached his conclusion through admissions by the aliens rather than through rumor or assumptions based upon observations "would be to permit a warrant to issue on the basis of the degree of speculation proscribed by the *Aguilar-Spinelli* test." *Id.* at 31. Similarly, in the case at hand, one can only speculate as to how the informant came to his conclusions that the firearms had been stolen and had been transported from Ohio to Kentucky. The further conclusionary language that there was on the premises stolen property which had been taken from burglaries in Ohio may be read in conjunction with the language about the firearms, to imply that the firearms were stolen in the burglaries. However, the only way that the informant could have so concluded to provide probable cause would be through personal participation in the burglaries or an admission by Wanda Lee as to where they came from. Neither of these was stated in the affidavit. Therefore, it is just as likely that the informant received his information from a rumor at a local bar.

Clearly, the information proved to be trustworthy after the execution was effected, as items of silver taken in burglaries from Virginia was found. On the other hand, there is no indication that any of the items found in the

house had been taken from burglaries in Ohio or that the firearms had originated in any state other than Kentucky. However, probable cause is not determined by results, but is based upon what facts and circumstances are available at the particular time of the issuance of the warrant. See, *e.g.*, *Byars* v. *United States*, 273 U.S. 28 (1927); *United States* v. *Nicholson*, 303 F.2d 330 (6th Cir.), *cert. denied*, 371 U.S. 823 (1962). Because probable cause was not shown in the affidavit, the motion to suppress will be sustained.

EXECUTION BY A STATE OFFICER

Assuming arguendo that probable cause was established, the Court also finds fault with the participation by the state officer in the execution of a federal search warrant. Clearly, the search warrant called for the execution by a federal officer. Moreover, Special Agent Gantenbein asserted that he, not a state officer, originally saw the silver. However, the state officers conducted all of the investigation concerning the silver and carried the silver from the premises. One of the arguments by the United States in the late filing of the inventory on the silver was that the federal agents did not take these from the premises, and, therefore, the federal government provided a proper return on the inventory of all the items taken, that is, the firearms.

Participation by a state officer is precluded, *United States* v. *Sanchez*, 509 F.2d 886 (6th Cir. 1975). Of course, in that case, it was an execution of a state search warrant, and the federal officers went along because the state officers had been told that there might be some illegal explosives on the premises. The result was that the federal officer found some illegal explosives, which were later the subject of a federal prosecution. In the case at hand, it

involved a federal search warrant with participation by a state officer, resulting in a federal prosecution, but not under the cognizance of the agency which executed the warrant, that is, the Bureau of Alcohol, Tobacco & Firearms. Instead, it is a Federal Bureau of Investigation case. That is not enough of a distinction in the mind of the Court to allow this evidence to be introduced, inasmuch as the State Police had total charge of the silver at the time of the search and thereafter. If it were not for the *Sanchez* case, this Court would be inclined to rule that the search was legal even though a state officer participated, but the Court feels bound by that decision under the facts and circumstances as outlined herein. See also *United States* v. *Gardner*, 537 F.2d 861 (6th Cir. 1976).

This 23 day of February, 1977.

/s/ EUGENE E. SILER, JR.,
JUDGE

No. 77-5229

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. WANDA JOYCE LEE, *Defendant-Appellee.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed August 21, 1978.

Before: WEICK and KEITH, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge, delivered the opinion of the Court, in which WEICK, Circuit Judge, joined. KEITH, Circuit Judge, (pp. 13-16) delivered a separate concurring opinion.

CECIL, Senior Circuit Judge. An indictment was filed in the United States District Court for the Eastern District of Kentucky, on December 2, 1976, charging the appellee, Wanda Joyce Lee, with knowingly receiving and concealing stolen goods, a quantity of silverware items of the approximate value of $27,000, which were moving as interstate commerce from the cities of Waynesboro and Harrisonburg, in the State of Virginia, to Kenton County, in the Eastern District of Kentucky, knowing said silver-

ware items to have been stolen, unlawfully converted and taken. (Sec. 2315, Title 18, U.S.C.)

On December 20, 1976, a motion was filed on behalf of the appellee to suppress for use at the trial the items of silverware alleged in the indictment to have been taken from the residence of the appellee at 270 Webster Lane, pursuant to a search warrant issued by United States Magistrate J. Gregory Wehrman, on November 15, 1976. It is claimed that the warrant is defective in several respects.

Special Agent Gerald C. Gantenbein, of the Bureau of Alcohol, Tobacco and Firearms made an affidavit, on November 15, 1976, before J. Gregory Wehrman, United States Magistrate, for the purpose of obtaining a search warrant to search the premises of the appellee. He stated, "That he has reason to believe that" in the premises described as the residence of Wanda Lee, * * *

> "there is now being concealed certain property, namely firearms; to wit miscellaneous rifles, shotguns and handguns, papers or records pertaining to the acquisition and disposition of firearms which are being possessed in violation of Title 18, Section 922 (j), U.S.C. and subject to seizure under Title 18, Section 924 (d) of the 1968 Gun Control Act.
>
> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On November 15, 1976, I received the following information from a reliable confidential informant who has demonstrated his reliability in the past by providing information which has resulted in several arrests, the seizure of illegal firearms, narcotics and stolen property. The informant stated that within the past five days, the informant observed a subject named Wanda Lee, who resides at 270 Webster Lane, Independence, Kentucky, in possession at her residence of a large quantity of stolen property that was taken

> in residential burglaries in the State of Ohio. The informant further related that amongst this property there were several stolen firearms which had been transported from the State of Ohio to the State of Kentucky.
>
> "The firearms were described as a miscellaneous lot of long guns and handguns totaling approximately fifteen in number. Several of these firearms are shotguns of varying descriptions and calibers. The informant also related that it is common practice for Wanda Lee to transport stolen firearms in the trunk of various automobiles available to her and that she sells or disposes of them from the trunk of the car.
>
> "These firearms were personally seen by the informant at the residence of Wanda Lee, 270 Webster Lane, Independence, Kentucky.
>
> "On November 15, 1976 a surveylance (sic) of the premises showed two vehicles parked on the premises. Vehicle #1 is described as a 1974 Oldsmobile bearing Kentucky License #FJD 861, and Vehicle #2 a 1971 Chevrolet bearing Kentucky License #FJD 862. A check of the Kentucky County Registrar shows that both of the vehicles are registered to Wanda Lee, Box 270 Webster Road, Independence, Kentucky."

Upon this affidavit, Wehrman, the United States Magistrate, issued a search warrant directed

> "To any Special Agent of the Bureau of Alcohol, Tobacco and Firearms or any other authorized person * * *"

The property described as concealed for which the warrant was issued is,

> "miscellaneous rifles, shotguns and handguns, papers or records pertaining to the acquisition and disposition of firearms"

It was further stated in the warrant,

> "and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit (s)."

It was commanded that the search for the property specified be made within forty eight hours and, if found to be seized, a return made of the property so seized and the property brought before the Magistrate.

The District Judge made Findings of Fact relative to the execution of the Search Warrant. We accept them as not being clearly erroneous. His Findings are as follows:

> "The search was commenced the same day at 3:00 P.M. and lasted until almost midnight of the same evening. Involved in the execution of the search warrant were Special Agent Gantenbein and other special agents with the Bureau of Alcohol, Tobacco & Firearms and one State Police officer, Sgt. Heath (sic — Keith). As a result of the search, a large quantity of silverware, with a total value estimated at $39,145.29, and nine firearms were seized and taken from the premises. After the search was completed, Special Agent Gantenbein filed his inventory pursuant to Rule 41 (d) with the United States Magistrate, but that inventory only included the firearms. Subsequently, after the defendant had moved the Court to suppress, alleging, among other things, that a complete inventory was not filed, another inventory was filed on January 12, 1977, listing the silverware taken.
>
> "Upon execution of the search warrant, almost immediately upon entering the premises, Special Agent Gantenbein saw in clear view in the laundry room the large quantity of silverware. On some of the items were found initials which did not correspond with those of Wanda Lee. Included in those initials were

> the following letters: 'H,' 'LGG,' 'W,' 'WBH,' 'LM,' 'M,' 'MEM,' 'A,' 'ABP,' 'D,' 'E,' 'KW,' 'CSW,' 'DHA,' 'LHW,' 'HM,' 'EAA,' 'MAL,' 'LVM,' 'HD,' 'B,' 'SW,' 'HKC,' 'Y,' 'AB,' and 'HJ.' Some of these items were sterling silver. There were in excess of 200 separate items of silver taken, mostly flatware, but including candleholders, dishes, bowls, pitchers, large trays, a silver coffee pot, silver goblets, a silver service and several carving sets. These were all items not ordinarily seen in a person's laundry room and were found in open view there.
>
> "After the agents had seen the silver, they found in the fireplace scraps of paper indicating that the silver belonged to a lady in Virginia. While the agents were still on the premises, the Kentucky State Police made telephone calls to Waynesboro, Virginia, and found that some two days earlier, the residence of a lady had been burglarized in that area and she had lost some silver in the burglary. Thereafter, the items listed in the two inventories were taken from the premises, with the firearms being taken by the federal agents, and the silver and other items taken by the Kentucky State Police. As a result, the indictment in this case was returned, charging the defendant, Wanda Joyce Lee, with a violation of 18 U.S.C. § 2315, knowingly receiving stolen property of a value in excess of $5,000.00, which had been transported in interstate commerce from Virginia to Kentucky. As far as can be determined at this time, no indictments have been returned in this Court pertaining to the firearms, nor have any state proceedings been instituted concerning the receipt of stolen property."

The District Judge considered the sufficiency of the warrant and search as raising the following questions:

> "1. The warrant is defective because it was not directed to a specific federal agent.
>
> "2. The inventory filed was defective.

"3. The silverware discovered were beyond the scope of the search.

"4. The failure of the affidavit to allege probable cause for the search warrant.

"5. The state officer was not authorized to participate in the search and, therefore, any items which were seized by him must be suppressed."

The Judge resolved the first three of these questions in favor of the government. We agree.

In considering the question of probable cause, the court held that this required a "two pronged" test,

> "First, the affidavit must set forth some of the underlying circumstances forming the basis for the informant's conclusion that there is illegal activity or evidence thereof on the premises, and, second, it must state facts which give some assurance that the informant is a credible person."

The court held that the second prong of the test is met but that the affidavit failed in the first prong of the test to show that the Magistrate had probable cause to issue the search warrant.

We consider now the legal sufficiency of the affidavit to show probable cause.

It was in *Aguilar* v. *Texas*, 378 U.S. 108, that the Court announced the "two pronged" test. With reference to the information of the informant the Court said, at page 114,

> "* * * the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, * * *"

The affidavit[1] which prompted the announcement of this principle was clearly lacking in material information upon which to issue a search warrant. It will be noted that the affidavit states no facts from the informer. It is the affiant who, as a result of information, not specified, from an informer, believes drugs are hidden on the premises described. This is wholly different from the affidavit in the case before us.

Believing that the principles of *Aguilar, supra*, should be further explicated, the Court granted certiorari in *Spinelli* v. *United States*, 390 U.S. 942.[2] Although the affidavit in this case contained much more information than the one in *Aguilar*, the Court held it to be insufficient in accordance with the principle announced in *Aguilar*. Although the Court held the affidavit to be factually insufficient, the decision finally turned on the allegation relative to the informer. This allegation was that the F.B.I. had been informed,

> "* * * by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones * * *"

Here, as in *Aguilar*, the affidavit gives no source of the information of the informer.

Affidavits are to be accorded a common sense interpretation. It was said in *United States* v. *Ventresca*, 380 U.S. 102 at 108, these decisions (*Aguilar* and others),

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[1] "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

[2] *Spinelli* v. *United States*, 393 U.S. 410.

> "* * * reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude bv reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

See *United States* v. *Jenkins*, 525 F.2d 819, 822 (6th Cir. 1975); *United States* v. *Giacalone*, 541 F.2d 508, 514 (6th Cir. 1976); *United States* v. *Swihart*, 554 F.2d 264, 267-268 (6th Cir. 1977).

In a recent opinion of this court, *United States* v. *Dudek*, 560 F.2d 1288, the court sustained the validity of a search warrant.[3] There were two affidavits in this case and the court held that they met the requirements of the two pronged test of *Aguilar, supra*. In arriving at this conclusion, the court drew heavily on the reasoning of *Vantresca, supra*.

Coming now to the affidavit before us, and interpreting it in the commonsense and realistic fashion provided in *Vantresca*, we conclude that the personal observance of the informant of a large quantity of stolen property taken in residential burglaries in Ohio, and having personally seen the firearms in question, satisfy the requirement of *Aguilar* that some "underlying circumstances" must be shown by the informer.

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[3] *United States* v. *Wasserstrom*, 571 F.2d 351 (6th Cir. 1978).

We said in *United States* v. *Sevier*, 539 F.2d 599, 603,

> "Great deference, even in a doubtful case, must be given by courts to the determination of magistrates."

In *United States* v. *Swihart, supra*, we said,

> "That determination should not be set aside unless arbitrarily exercised."

The statement of our court in *Jenkins, supra*, at 823 is applicable here.

> "In the light of this discussion, we do not hesitate to say that the affidavit here at issue is considerably less than ideal. However, in determining whether a search warrant should issue, the magistrate deals only with probabilities rather than certainties."

We hold that the affidavit was sufficient to give the magistrate probable cause for issuing the search warrant.

The trial judge held that, even assuming, arguendo, the affidavit submitted in support of the search warrant established probable cause for its issue, the silver, the subject of the motion to suppress, found during the execution of the search, should be suppressed because of the participation in the search of Sergeant Keith, a Kentucky State Police officer.

Special Agent Gantenbein of the Federal Bureau of Alcohol, Tobacco and Firearms, in charge of the execution of the search warrant, requested the state officer to accompany him and participate in the execution of the warrant. He stated that it was his practice always in such cases to invite a state officer to participate in the search. The District Judge cited *United States* v. *Sanchez*, 509 F.2d 886 (6th Cir. 1975), in support of his decision.

The search began at 3:00 P.M. of the day the warrant was issued and continued until nearly midnight. Partici-

pating in the search with Special Agent Gantenbein were other special agents of the Bureau of Alcohol, Tobacco and Firearms and Sergeant Keith of the Kentucky police.

Immediately upon entering the premises to be searched, Agent Gantenbein saw, in clear view in the laundry room, a large quantity of silverware which is the subject of the motion to suppress in this case. There were in excess of 200 items of silver here, consisting mostly of flatware, but including candleholders, dishes, bowls, pitchers, large trays, a silver coffee pot, silver goblets, a silver service, and several carving sets. Some of the items were sterling silver and on some of them were various initials, none of which corresponded with the name of Wanda Lee.

After the agents had seen the silver, they found in the fireplace scraps of paper indicating that the silver belonged to a lady in Virginia. At this point the state officer took over the investigation and, by telephone calls to Waynesboro, Virginia, found that, a few days before, the residence of a lady had been burglarized in that area and that some silver had been stolen. Thereafter the firearms were taken by the federal agents and the silver by the state police. Upon completing the search, an inventory was made and returned of the firearms but none was made of the silver until Agent Gantenbein made and returned one just prior to the hearing on the motion to suppress.

The District Judge found that, discovering the silver in the process of the search, under such circumstances as made it appear obvious that it was stolen, the officers had probable cause to seize it. We agree. However, in the judgment of the District Judge, it was the participation in the search by Sergeant Keith, as a state officer, and his subsequent investigation, seizure and possession of the silver that justified the suppression of the silver as evidence. We do not read *Sanchez, supra*, to require this conclusion.

Section 3105, Title 18, U.S.C. provides,

> "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, *except in aid of the officer on his requiring it, he being present and acting in its execution.*" (Emphasis added)

Richard Sanchez was indicted by a federal grand jury on two counts involving the receiving, concealing and storage of explosives contrary to federal regulations. The charges grew out of a search made under the following circumstances.

On the evening of October 30, 1973, Officer David Mullin of the Toledo Drug Enforcement Unit received information from a confidential informant that he had seen heroin in the home of the defendant. Pursuant to this information he obtained a search warrant for narcotics for the home of Sanchez. Shortly after he had obtained the warrant he received another call from the same informant advising that there were explosives in the same residence. Officer Mullin then contacted an agent of the Alcohol, Tobacco and Firearms Bureau and advised him of the explosives and requested him to accompany him on the search.

Although two hours elapsed before the search was made, the federal agent did not obtain a search warrant to search for the explosives. In the process of executing the state search warrant, the explosives, which were the subject of the indictment, were found and seized by the federal agent. No narcotics were found by the state officer.

Here there were two simultaneous but distinct searches being conducted, one by a state officer for narcotics and

the other for explosives by a federal officer. Only the state officer had a warrant, although the federal officer had probable cause to believe that there were explosives on the premises being searched and had had an opportunity to procure a search warrant. This, then, is the crux of this case, and the *warrantless* search a violation of the defendant's Constitutional rights guaranteed by the Fourth Amendment.

We do not interpret *Sanchez* to hold that the presence of the federal agent on the premises was per se unauthorized. The Court said at page 889,

> "We believe that the warrant authorized only the local officers to enter and search the Sanchez property for narcotics. *It could not be used to validate the entrance of a federal officer having both probable cause and the opportunity to obtain a separate warrant to search for different items of property.*" (Emphasis added).

The warrant in the case at bar authorized "any Special Agent of the Bureau of Alcohol, Tobacco and Firearms or any other authorized person" to execute it. We believe that Agent Gantenbein had the authority to delegate Sergeant Keith to accompany him in the execution of the warrant. If he had that authority, he had the right to expect that he would assist in the search. As the District Judge said, if the silver had been taken by the federal agent, it would have been legal. We hold that it did not become illegal by reason of the participation of Sergeant Keith.

In the case before us, contrary to the *Sanchez* case, neither Agent Gantenbein nor Sergeant Keith had probable cause to believe that they would find stolen silver on the premises to be searched. We find no authority for

the finding that Sergeant Keith was on the premises of the defendant without authority.

Reversed and remanded with instructions to try the defendant on the indictment.

KEITH, Circuit Judge, concurring. I concur in the Judgment of the court and in the majority opinion. I would have preferred, however, a search warrant affidavit that fully set out the underlying circumstances which supported the informant's belief that the guns he saw at Lee's house were stolen, or which indicated that independent steps were taken by the agents to corroborate the informant's information.

In *United States* v. *Wasserstrom*, 571 F.2d 351 (6th Cir. 1978) (per curiam), cited in the majority opinion, the search warrant affidavit contained the following information:

> That on or about September 28, 1976, a confidential informant, a citizen with no known criminal felony record, who has been a "simple witness" and not a "professional informant," obtained Stock Certificate No. AKC 209219, copy attached, 100 shares of Ohio Edison Company, issued to Stella W. Haver, from a drawer located under the front bedroom window on the third floor of the premises at 1985 Sunbury Road.
>
> Said informant has told affiant that said certificate was one of approximately 1,000 certificates and 200 envelopes containing what appeared to be bond coupons which he observed in the drawer.
>
> Verification with Vercoe and Company, Mansfield, Ohio, the mailer of the stock certificate, discloses that said certificate was contained in Register No. 2794 of the United States Mails. This stock certificate is described by Vercoe and Company in the attached list of

> stock certificates which were contained in Register No. 2794. This register is listed in records of the U. S. Postal Service as being on an U. S. Postal truck which was robbed on September 24, 1976, in Franklin County, Ohio, the mail pouch containing said register being illegally taken from said truck at that time.
>
> Further, U. S. Postal Service information reflects the fact that approximately 200 envelopes containing bond coupons valued at approximately $136,000.00 were included in the stolen registered mail shipment.

Appendix in No. 77-5261 at V. This affidavit clearly shows how the agents verified the information given to them by the informant. It is far more detailed and factual than the affidavit here under consideration. The verification was made necessary, of course, by the fact that the agents could not rely on the "previous reliability" of this informant. But although the affiant in the instant case states that the informant had proven to be previously reliable, *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), that statement supports the informant's assertion that he saw the guns, and not that the guns he saw were stolen. *See United States* v. *Harris*, 403 U.S. 573, 586-601 (1971) (dissenting opinion) (Harlan, J.).

In *Draper* v. *United States*, 359 U.S. 307 (1959), involving a warrantless arrest made after the police officers had verified an informant's tip, and *United States* v. *Harris*, *supra*, involving the sufficiency of a search warrant affidavit, the police officers themselves either verified the informant's information, or the affidavit indicated how the informant knew that the suspect was engaging in illegal activity. The affidavit relied upon to obtain a search warrant in *United States* v. *Ventresca*, 380 U.S. 102, 103-4 (1965), was based upon the personal observations of the affiant Alcohol, Tobacco and Firearms (ATF) agent and

other ATF agents. Thus, the statement in *Ventresca* that search warrant affidavits should not be read in an overly technical manner does not, I would suggest, apply to a situation where the affidavit is unclear as to how the informant obtained his information, and the affiant has not conducted any independent verification of the informant's information. (In this case the agents did check the cars in front of Lee's house and established that she owned these vehicles, but that was irrelevant to the probable cause issue of whether the guns were stolen or not. The fact that she owned the cars is consistent with innocent activity.)

Cases from this circuit which have upheld the sufficiency of arrest warrant and search warrant affidavits have also involved situations where an element of probable cause was based upon information within the personal knowledge of the affiant, or where an informant's tip had been corroborated by police investigation. Thus, in *United States* v. *Jenkins*, 525 F.2d 819 (6th Cir. 1975), the affiant stated that he knew of his own knowledge that Jenkins was a convicted felon. Once that fact was established, probable cause to arrest Jenkins existed when the informants stated that they saw (personal observation) Jenkins carrying a gun. And in *United States* v. *Dudek*, 560 F.2d 1288, 1292-93 (6th 1977), the court noted that "not only were there two different and detailed listings of goods alleged to be located at the two different locations and a statement that all goods had been 'stolen in burglaries,' *but in addition, there was the confirmation by law enforcement officers themselves of one item of stolen goods, namely, the stolen boat.*" (Emphasis added.)

In the instant case, the search warrant affidavit alleges a violation of 18 U.S.C. § 922. In another case where a similar violation was alleged, the search warrant affidavit

was supported by substantially more information and corroboration than is here presented:

> Rivard's [the informant] charges that Scherer [the suspect] was selling firearms from his house was bolstered by the four purchases made at this location, three of which were made under Government surveilance. Prior to each purchase Rivard had been able to provide Government agents with the name, price, and model number of each weapon eventually sold. Finally, Rivard's assertion that numerous weapons were lying about Scherer's house, and that Scherer was keeping two Thompson machine guns without serial numbers in a box in his barn was corroborated by two special agents who visited the defendant's farm prior to the search.

United States v. *Scherer*, 523 F.2d 371, 376-77 (7th Cir. 1975), *cert. denied* 424 U.S. 911 (1976).

Here the informant personally observed the quantity and variety of guns in Lee's house. This information is presented in the affidavit. The additional detail provided in the affidavit is the informant's assertion that the property he saw was stolen in Ohio, and that it was "common practice" for Lee to transport and sell stolen firearms from her car. While Lee's reputation might not be irrelevant in determining probable cause, *United States* v. *Harris*, 403 U.S. at 582, it is certainly not a sufficient basis upon which to issue a search warrant. In *United States* v. *Harris*, *supra*, it was the affiant investigator's personal knowledge of the suspect's reputation which the Court held was a "practical consideration of everyday life" upon which an officer or Magistrate could properly rely when assessing the reliability of an informant's tip. 403 U.S. at 583. In the instant case the affiant agent appears to have had no personal knowledge of Lee's reputation. He does not confirm the unidentified informant's report that it was

"common practice" for Lee to transport and sell stolen firearms; nor does the affidavit provide the Magistrate with the underlying circumstances from which the informant concluded that this criminal activity was a common practice with Lee. As to the other "detail," the affidavit does not indicate why the informant thought that the guns he saw were stolen in burglaries in Ohio, or that the ATF agents had taken steps to corroborate this information, and had in fact corroborated it, prior to seeking a search warrant.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5229

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WANDA JOYCE LEE,
Defendant-Appellant.

ORDER

(Filed October 20, 1978)

BEFORE: WEICK and KEITH, Circuit Judges, and CECIL, Senior Circuit Judge.

The petition for rehearing with suggestion of rehearing en banc filed by the defendant-appellant having come on for consideration, and none of the Judges of this Court having favored ordering consideration en banc, the petition for rehearing was submitted to the hearing panel.

Upon consideration of the petition for rehearing, the Court concludes that the issues raised therein were fully considered upon submission and decision of the case. Petition denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk